SUPREME COURT, U. S.

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IN THE

Supreme Court Of The United States

October Term, 1968

No. [redacted] 7

In The Matter Of The Application

— Of —

Susan Epperson and H. H. Blanchard

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court Of The United States

October Term, 1967

No. _____

SUSAN EPPERSON AND H. H. BLANCHARD, ... *Appellants*

— v. —

STATE OF ARKANSAS, ... *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

JURISDICTIONAL STATEMENT

Appellants appeal from the final order of the Supreme Court of Arkansas of July 26, 1967, denying their petition to grant rehearing of the judgment of the Supreme Court of Arkansas, entered on June 5, 1967, reversing the decision of the Chancery Court of Pulaski County, Arkansas, entered on June 16, 1966, which had declared, on petition and intervention of appellants, that Initiated Act No. 1 of 1928 (Acts of Arkansas, 1929, Vol. II, p: 1518, et seq; Ark. Stats. Ann. Secs. 80-1627 and . 80-1628), was unconstitutional and void. Appellants submit this statement to show that this Court has jurisdiction of the appeal and that substantial federal questions are presented.

CITATION TO OPINION BELOW

The decree entered by the Chancery Court of Pulaski County, Arkansas on June 16, 1966, was accompanied by a written opinion (R. 59). That opinion, which is not officially reported, is set out in the Appendix, *infra*, p. 21. The opinion (*per curiam* order) of the Supreme Court of Arkansas is not yet officially reported (R. 182) and is set out in Appendix, *infra*, p. 19.

JURISDICTION

Appellants sought a declaratory judgment out of the Chancery Court of Pulaski County, Arkansas, pursuant to Ark. Stats. Ann., Secs. 34-2501 through 34-2512, that Initiated Act No. 1 of 1928, is unconstitutional and void, asserting in their petition for this purpose that said Act violated their respective constitutional rights guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States (R. 2). The Chancery Court of Pulaski County, Arkansas, issued its written opinion on May 27, 1966, and decree on June 16, 1966, holding that said Act did violate those constitutional guaranties of appellants (R. 59).

The State of Arkansas filed its Notice of Appeal to the Supreme Court of Arkansas on June 21, 1966, the Little Rock School Directors (parties defendant in the lower Court) not joining in the appeal (R. 73). On June 5, 1967, the Supreme Court of Arkansas reversed the decree of the lower Court and held that Initiated Act No. 1 of 1928 did not violate the constitutional rights of appellants, and dismissed their petitions (R. 182). Appellants promptly and timely filed with the Supreme Court of Arkansas petition for rehearing, as required by Arkansas procedure, and

on July 26, 1967, the Supreme Court of Arkansas refused to grant to appellants the requested rehearing, and thereby the decision of the Supreme Court of Arkansas became final on that date (R. 194).

The notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Arkansas on September 25, 1967 (R. 184-A).

Jurisdiction of this Court on appeal rests upon 28 U. S. C. Sec. 1257(2). *Williams v. Bruffy*, 96 U. S. 176 (1877); *Largent v. Texas*, 318 U. S. 418 (1943); *Griswold v. Connecticut*, 381 U. S. 479, (1965).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Petitioner Epperson, a science (biology) teacher at Little Rock Central High School in the Little Rock School District, and petitioner Blanchard, a parent of school-age children in the public schools of Arkansas, sought to have declared unconstitutional and void Ark. Stats. Ann., Secs. 80-1627 and 80-1628, which provides:

> *SECTION* 80-1627. DOCTRINE OF ASCENT OR DESCENT OF MAN FROM LOWER ORDER OF ANIMALS PROHIBITED. — It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals, and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select

textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.

SECTION 80-1628. TEACHING DOCTRINE OR ADOPTING TEXTBOOKS MENTIONING DOCTRINE. — PENALTIES. — POSITIONS TO BE VACATED. — Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act (Secs. 80-1627, 80-1628) by teaching the theory or doctrine mentioned in Section 1 (80-1627) hereof, or by using, or adopting any such textbooks in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars ($500.00); and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member.

2. Petitioners alleged in the lower Court action that the above quoted Arkansas statute violated the First Amendment and the first Section of the Fourteenth Amendment to the Constitution of the United States of America.

QUESTIONS PRESENTED

1. Do the Arkansas anti-evolution laws (Ark. Stats. 80-1627 and 80-1628) violate the First Amendment to the Constitution of the United States by denying to appellants the rights of freedom of speech, of thought and expression, and the right to teach and the freedom to learn?

2. Do the Arkansas anti-evolution laws violate the Fourteenth Amendment to the Constitution of the United States if they are construed to fall into the category of permissible police legislation which would warrant the extinguishment of the freedom of speech and the freedom to learn, in that they deny to appellants the equal protection of the laws by limited applicability to "tax-supported" schools?

3. Do the Arkansas anti-evolution laws violate the due process clause of the Fourteenth Amendment to the Constitution of the United States by defining as a crime, in vague and indefinite terms, "to teach the theory"?

4. Do the Arkansas anti-evolution laws violate Amendment One to the Constitution of the United States by denying to appellants their guaranteed freedom of religion?

STATEMENT OF THE CASE

In the year 1928 the people of Arkansas adopted the questioned statute which provides, in brief, that it is unlawful, with criminal penalties attached, to teach the theory or doctrine, in any tax-supported school, that mankind ascended or descended from a lower order of animals, or, to select, adopt or use, in Arkansas tax-supported schools, a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.

Appellant Susan Epperson, a science teacher in Little Rock Central High School, employed by the Little Rock Public School District to teach the subject of biology during the school year beginning in 1965, was furnished the prescribed textbook adopted for use in the biology course

for the school year, which textbook contained chapters on the theories of the evolution of man (R. 78). Faced with the problem of either failing to teach her subject properly, or, violating a criminal law of the State of Arkansas, she filed this action in the Chancery Court of Pulaski County, Arkansas, seeking a declaratory judgment that Ark. Stats. Ann. Secs. 80-1627 and 80-1628 (called "anti-evolution law"), was a void enactment in that it violated her rights of free speech guaranteed to her by the First and Fourteenth Amendments to the Constitution of the United States. She alleged it was her duty as a teacher to discuss with and explain to the students all scientific theories, including the Darwinian concept of evolution that man ascended from a lower form of animal life, and that she intended to acquaint her students with the facts of this theory, but did not intend to ask or require them to accept it as true. In addition, she asserted that if the Darwinian heory of evolution was interpreted to be a religious theory (which she denied), that legislation such as the questioned Act would violate the same constitutional guaranties, supra (R. 6).

Appellant Blanchard, a parent of two minor children enrolled in the Arkansas public schools, intervened in this action, by permission of the lower Court (R. 14, 15), and in addition to adopting the allegations of the complaint, alleged, for the same constitutional reasons, that to deny his sons, and him, of the right to be taught, and to teach them, and to learn, and the academic freedom of exposure to all scientific theory, denied to him and his children their guaranteed right of freedom of speech (R. 17).

The lower Court, after hearing the evidence, and considering the arguments of counsel, issued a written opinion finding that the questioned statute did violate the constitu-

tional guaranties of freedom of speech of plaintiff and intervenor (R. 59).

The Sate of Arkansas, by its Attorney General, appealed this decision to the Supreme Court of Arkansas on June 21, 1966, but the Little Rock School Directors and the Superintendent of the Little Rock Public Schools, the named defendants in this action, did not join in this appeal. On June 5, 1967, the Supreme Court of Arkansas, in a *per curiam* order joined in by six or seven members of the Court (one of the six concurring as to the constitutional question but dissenting as to the second sentence of the order), reversed the lower Court decree and held that the Arkansas "anti-evolution act" is a valid exercise of the state's power to specify the curriculum in its public schools. Appellants filed in the Supreme Court of Arkansas, on June 20, 1967, timely petition for rehearing, as required, which petition the Supreme Court of Arkansas denied on July 26, 1967, and thereby the decision of the Supreme Court of Arkansas that the Arkansas anti-evolution law is valid became a final determination and appellants have no further recourse to Arkansas courts for relief.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED

Appellant Epperson raised the federal questions in her complaint as follows:

> "Plaintiff asserts and alleges that Arkansas Statutes 80-1627 & 80-1628, the so-called "Monkey Bill" is void and of no effect being unconstitutional and void as conflicting with plaintiff's constitutional right of freedom of speech as guaranteed by the First and Four-

teenth Amendments to the Constitution of the United States . . . (R. 5, 6).

"Plaintiff states that the sponsors of said statutes seek to justify its adoption and enforcement on the grounds that the Darwinian theory is a religious theory contrary to Christianity. Such assertion is contrary to the facts and erroneous, but as interpreted by said sponsors constitutes action by the State to enter the field of religions which is specifically prohibited by Amendments One and Fourteen of the Constitution of the United States . . ." (R. 6).

Appellant Blanchard, in addition to adopting the above allegations contained in the complaint of appellant Epperson, also alleged:

"Intervenor asserts that to deny his sons the right to be informed of all scientific theories and hypotheses is to deny them access to a complete education so highly desirable for the development of mental capacity and ability; that the guaranties of the 14th Amendment to the Constitution of the United States secure to every citizen of the United States the right to access to all sources of knowledge and learning including the right to be informed of scientific theories or hypotheses irrespective of whether the scientific theories or hypotheses are accepted or believed by a majority or minority of the other citizens of the United States. The "intervenor asserts that the guaranty of freedom of speech provided by both the Constitution of the United States . . . includes the guaranty of the freedom to learn. A complete and satisfactory education requires that scholars be informed of what may not be believable as well as what may be believable,

and academic freedom to learn demands that the scholar, and not a political majority, shall have the right to select what, to him, is believable and what is not believable. The Constitution of . . . the United States secures to every scholar the constitutional right to be infromed of all scientific theories and hypotheses and the constitutional right, unrestricted by belief of the majority, to accept that which he and he alone considers credible and worthy of belief.

"Intervenor asserts and alleges that Ark. Stats. 80-1627 and 80-1628 deny to intervenor's sons the right to be taught and to learn, and in doing so contravenes the guaranties of freedom of speech and freedom to learn secured by the Constitution of the United States . . . Intervenor asserts that said statutes are void and of no effect and that this Court should enter its decree declaring said statutes unconstitutional and void." (R. 16).

The written opinion of the trial court dealt specifically with each of the constitutional questions raised in the complaint and intervention. The trial Court said:

"The issue presented for determination in this case is whether or not the statute conflicts with the constitutional provisions securing the rights of freedom of speech, of thought, and expression, and securing the right to teach and the freedom to learn. Whether 'the theory or doctrine that mankind ascended or descended from a lower order of animals' is true or false is not the issue presented, and, as above pointed out, is not a triable issue. The truth or the fallacy of arguments on each side of the evolution debate does not either contribute to or diminish the constitutional

right of teachers and scientists to advance theories and to discuss them.

"Any statute which seeks to limit or restrict the field of inquiry should be carefully and closely examined by the courts. 'Teachers and students must always remain free to inquire, to study and to evaluate.' *Shelton v. Tucker,* 364 U. S. 479 (1960).

"By use of the word 'teach' the court accepts the common definition 'to make aware of by information or to impart the knowledge of'. That this is the meaning of the word 'teach' intended by the statute is obvious since the statute forbids any teacher, textbook commission or other authority to adopt 'a textbook that *teaches* the doctrine or theory'.

"This Court is of the opinion that Act No. 1 of 1928 tends to hinder the quest for knowledge, restrict the freedom to "learn, and restrain the freedom to teach, and that a chapter in a biology book, adopted by the school administrative authorities, stating that a specific theory has been advanced by an individual that man ascended or descended from a lower form of animal life, does not constitute such a hazard to the safety, health and morals of the community that the constitutional freedoms may justifiably be suppressed by the state.

"Therefore, it is the opinion and ruling of this Court that a decree be entered declaring initiated Act No. 1 of 1928 unconstitutional and void, and that the defendants have no authority to proceed under the act or to enforce the provisions thereof." (R. 59).

In accordance with the written opinion of the lower

Court, on May 27, 1966, it entered the following decree on June 16, 1966:

> "It is, therefore, considered, ordered, adjudged and decreed that Initiated Act No. 1 of 1928 is hereby declared unconstitutional and void . . . The memorandum opinion heretofore issued by the Court is made a part of this decree (R. 71)."

On appeal to the Supreme Court of Arkansas, appellees Epperson and Blanchard presented, by brief and argument, the following additional questions for the consideration of that Court (in addition to arguing the constitutional questions considered by the lower Court):

> "The statute is void under the equal protection of the law clause of the 14th Amendment to the Constitution of the United States because of its limited application to tax supported schools, only.
>
> "The statute conflicts with the due process clause of Amendment 14 to the Constitution of the United States in that it is vague and indefinite by defining as a crime 'to teach the theory' ".

These constitutional questions were thoroughly briefed and argued by the parties in the Supreme Court of Arkansas, the State arguing that the statute did not deny to appellants (appellees there) any right guaranteed by the Constitution of the United States, much less freedom of speech and religion, the due process of the law, or the equal protection of the law. In the State's brief to the Supreme Court of Arkansas the Point To Be Relied Upon was stated to be: "The Arkansas statutes prescribing the teaching of evolution are constitutional, being a reasonable regulation of the conduct of a public employee, a school

teacher, and a reasonable regulation of the curriculum in the public schools".

In reversing the lower Court declaration of unconstitutionality the Supreme Court of Arkansas considered the constitutionality of the anti-evolution statute and stated (quoting its entire "opinion"):

> "Upon the principal issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928, Ark. Stat. Ann. Sec. 80-1627 and 80-1628 (Repl. 1960), is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.
>
> "The decree is reversed and the cause dismissed.
>
> "Ward, J., concurs. Brown, J., dissents."

Within the time prescribed by Arkansas law, on June 20, 1967, appellants filed Petition For Rehearing with the Supreme Court of Arkansas, with accompanying brief, arguing that the Supreme Court of Arkansas erred in the following particulars:

> "In failing and refusing to declare Initiated Measure No. 1 of 1928, unconstitutional and void as being in direct conflict with the protections granted the appellees under the specific language of the First Amendment to the Constitution of the United States.
>
> "In failing and refusing to declare that the Initiated Act No, 1 of 1928 was void because it conflicts with the equal portection of the laws clause contained in

Amendment 14 to the Constitution of the United States.

"In failing and refusing to declare that Initiated Act No 1 was unconstitutional and void in that it is so vague and indefinite as to conflict with the due process clause of Amendment 14 to the Constitution of the United States.

"In failing and refusing to declare that Initiated Act No. 1 was unconstitutional and void in that it was arbitrary and capricious and in conflict with the due process clause of the Constitution of the United States.

"In failing and refusing to declare Initiated Act No. 1 unconstitutional and void in that it conflicted with the provisions of Amendment 1 of the Constitution of the United States guaranteeing the freedom of religion."

On July 26, 1967, the Supreme Court of Arkansas, in a *per curiam* order, denied to appellants the requested rehearing, and thereby affirmed its holding that the Arkansas "anti-evolution" statute did not violate the Constitution of the United States in each and every particular argued by appellants. The denial of this requested rehearing by the Supreme Court of Arkansas made its decision final as of July 26, 1967, and the appellants have no other recourse in State courts to present the constitutional questions raised in this action.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

To what extent can a state government, by statute, suppress the search for knowledge, for truth and the desire to educate future generations? The scope of this question

is not novel to the United States Supreme Court, and the answer given on this appeal will affect not only the appellants involved, but will define, further, the rights of all citizens, now and in the future, to the freedom to learn, to probe, to evaluate, to teach, to discuss and to think.

The State of Arkansas, by its highest Court, has decided that it can enact a statute, under the guise of controlling educational curriculum in its public schools, proscribing the teaching of any theory that man ascended or descended from a lower order of animals. If this can be done in our society, validly, then just as surely the state can enact statutes proscribing the teaching of any subject or theroy, be it geometric progression, history, nuclear fission, English literature, Latin, or what not. In the instant case the ban was held valid not on the basis that the theory is dangerous to the health, safety or morals of society, but rather on the ground that it was a valid exercise of the state's power to specify the curriculum in its public schools. What is to prevent the state, then, from enacting statues proscribing all learning, all inquiry, and all teaching under the same power? No restraint or restriction is placed on this power, and if it is held to exist the only possible restraint rests in the hands of the political majority for so long as they have the right to vote.

After announcing that the Arkansas anti-evolution statute was a valid enactment by the state, the Arkansas Supreme Court added an interesting, but bewildering, second sentence to its two sentence *per curiam* order (which additional sentence brought on one more dissent, by Ward, J.). By that sentence the Court stated "it expressed no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not be-

ing necessary to a decision in the case, and the issue not having been raised". This necessitates a brief review of the position of the case before that Court.

Mrs. Epperson, by her complaint for a declaratory judgment that the statute is unconstitutional, sought clarification of the untenable position in which she found herself. As a teacher of biology in the public schools of Arkansas she had been furnished a prescribed textbook containing the details of the theory that man ascended or descended from a lower order of animals. Being aware that this law made it a criminal act to teach this doctrine, or, to use a textbook that taught the docrine, she filed her peition (R. 2; 78). Obviously, this raised the issue whether the Act prohibits any explanation of the theory, or, alternatively, whether it prohibited teaching that the theory is true. Her petition states:

> "Plaintiff intends to acquaint her students with the facts respecting this theory because plaintfif believes that scholarship cannot flourish in an atmosphere of academic and intellectual restraint and that teachers and students must be free to inquire, to study, and to evaluate. Plaintiff does not intend to ask or require that said scientific theory or hypothesis be accepted or rejected by the students. Plaintiff believes, however, that there can be no acceptance of any theory or hypothesis in the darkness of ignorance" (R. 3, 4).

The lower Court faced this issue squarely, in its written opinion when it stated:

> "In view of the testimony of plaintiff that she does not propose, intend, or desire to teach as a proved and established fact the theory (of the evolution of man) . . . this court can find no 'exigent and obviously com-

pelling' reason to prohibit a teacher from presenting and explaining the theory, along with other theories . . . which a student may accept or reject . . . By use of the word 'teach' the court accepts the common definition 'to make aware of by information or to impart the knowledge of'. That this is the meaning of the word 'teach' intended by the statute is obvious since the statute forbids any teacher . . . to adopt 'a textbook that *teaches* the . . . theory'. (R. 66).

"The truth or the fallacy of arguments on each side of the evolution debate does not either contribute to or diminish the constitutional right of teachers and scientists to advance theories and to discuss them." (R. 65).

If, as the Arkansas Court has now held, the Act in constitutional, by its specific terms the act of "teaching", or "using a textbook that teaches" the theory is a criminal act, and Mrs. Epperson, and all other teachers in the public schools of Arkansas become criminals if they perform the acts which she alleged in her complaint she wished to perform. Stated differently, by virtue of the decision of the Arkansas Supreme Court, and in spite of the second sentence in its "opinion", Mrs. Epperson is now effectively prevented from doing that which by her complaint in this case she alleged she desired to do, and would do, but for the Act.

Appellant Blanchard, the father of young children attending the public schools of Arkansas, is in the same untenable position as Mrs. Epperson, the only difference being that he desires his children to be exposed to, or to learn, the facts of all scientific theory. The decision of the Arkansas Court in this case sets a dangerous precedent

which grants, if allowed to stand, unlimited power to move into the totally controlled state visualized by Orwell in 1984. The freedom of speech guaranty in the First Amendment to the Constitution of the United States is also a guaranty of the freedom to learn. The Blanchard children have a constitutionally guaraneed right to access to all available scientific knowledge, be it theory or fact, and this right to learn is not, in this country, subject to the whim of the majority by the exercise of their vote. Misguided ignorance may not constitutionally suppress the quest for knowledge and the truth, even though suppression is accomplished through the power of the poll. "The First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas v. Collins,* 323 U. S. 516 (1944). The freedom to learn, secured by the constitution, means freedom in one's native state, not access to freedom in a more enlightened political climate. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. 'By limiting the power of the states to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation . . . Teachers and students must always remain free to inquire, to study and to evaluate . . .' " *Shelton v. Tucker,* 364 U. S. 479 (1960), citing *Wieman v. Updegraff,* 344 U. S. 183 (1952), and *Sweezy v. New Hampshire,* 354 U. S. 234 (1957).

I. APPELLANTS WERE DENIED FREEDOM OF SPEECH AND FREEDOM TO LEARN

No contention is made that appellants freedom of speech gives them unrestricted and uncontrolled discretion to teach and to learn any subject they respectively select, nor do appellants contend that this freedom is not subject to exception or limitation. *Kovax v. Cooper,* 336 U. S. 77 (1948). However, appellants do urge that "for society's good . . . inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and people's well-being, except for reasons that are exigent and obviously compelling". *Sweezy v. New Hampshire, supra.* While constitutional freedoms are subject to the police power of the State, "the police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably". *Nashville Ry. Co. v. Walters,* 294 U. S. 405 (1934).

These freedoms cannot be extinguished under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Neither is a determination by the legislature or the political majority final; it is always subject to supervision by the courts. *Meyer v. Nebraska,* 262 U. S. 390 (1922) and *Bartels v. Iowa,* 262 U. S. 403 (1922). Appellant Epperson, by virtue of the decision of the Arkansas Supreme Court, cannot teach or use the prescribed textbook that teaches the statutory proscribed theory; and appellant Blanchard cannot have his children taught the theory. Clearly this violates their respective rights of free speech.

II. APPELLANTS WERE DENIED THE EQUAL PROTECTION OF THE LAW

In order for this statute to stand as a proscription against freedom to teach, to inquire, and to learn the theory suppressed by the statute, that theory must be construed to be so dangerous to the health, safety and morals of the people of Arkansas that it falls within that field of permissible police legislation which warrants the extinguishment of constitutional freedoms. Once the state determines to exercise that power, it owes its duty to all the people to protect them equally, and therefore if the questioned statute be considered in that category, the state must protect all students from exposure to such a corrupt and dangerous doctrine. The provisions of the questioned statute apply only to those students attending tax supported (public) schools. Is not the state required to be just as vigilant in protecting the health, safety and morals of students in parochial schools and private schools?

Regardless of the roots from which the discrimination springs, and regardless of the laudable motives of those responsible for the statute, the uncontrovertible fact remains that the terms of the Act extend the shelter of its protection to part of the students of Arkansas and leave exposed to the ravages of science those who attend parochial and private schools. Surely an act which constitutes a crime in one school cannot be permitted in the other school. "One must be ever aware that the Constitution forbids sophisticated as well as simple-minded modes of discrimination." *Reynolds v. Sims*, 377 U. S. 533 (1964).

III. APPELLANTS WERE DENIED DUE PROCESS OF LAW

The statute assailed by appellants defines as a crime the act "to teach the theory" and "to adopt or use a textbook that teaches the theory". As a criminal statute it must not be vague or indefinite and the standards of conduct which it attempts to prohibit must be defined with crystal clear certainty. If it is subject to various interpretations by different persons, then it is clearly unconstitutional. No attempt is made in the statute to define what is meant by the word "teach", so if it is subject to various definitions, then the guidelines it sets for the citizens to follow are not sufficiently defined to permit the citizens to adjust his or her conduct with any degree of assurance that he will not become, inadvertently, a criminal.

Webster's New International Dictionary, 2nd ed., lists seven varying definitions of the word "teach". The due process clause of the Constitution of the United States will not permit any criminal statute to have such a scatter-gun application, as everyone is compelled to guess just exactly what the statute covers. "This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California,* 361 U. S. 147 (1959).

IV. APPELLANTS WERE DENIED RELIGIOUS FREEDOM

When freedom of inquiry, freedom of study and freedom to learn are made subordinate to the religious beliefs of the majority, academic freedom becomes sub-

servient to religious doctrine and this is specifically prohibited by the Constitution of the United States. The statute under attack does not limit the prohibition to teaching that the theory is true, it simply denies the teacher and the school authorities from making known to the student that such a theory has been advanced, whether it is true or untrue. Appellants do not construe the Darwinian Theory as attacking and being inconsistent with the story of the creation of the earth, as set forth in the Christian Bible. However, one of the great arguments of the proponents of the "anti-evolution" statute is this Biblical inconsistency, which, perforce, casts the argument to that extent into a religious role. Therefore, it becomes necessary to examine the statute considered in the light of the First Amendment to the Constitution of the United States and its expressed guaranty of freedom of religion.

We think it will be conceded that neither the state nor the federal government could force the teaching of the Darwinian Theory as a religious belief. Can the state, therefore, suppress the teaching of the theory on the grounds that it is an anti-belief? "However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures." *Burstyn v. Wilson*, 343 U. S. 495 (1951). "Neither can con-

stitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso v. Watkins,* 367 U. S. 488 (1961).

V. THE EFFECTS OF THE STATUTE

If what the scholar may study is based upon the acceptance by the political majority as inoffensive and true, then the scholar has no right of personal evaluation. He is confined within the walls of the understanding of the majority and his search for greater understanding and a new maturity is doomed to stagnation. The "anti-evolution" statute of Arkansas deny appellants and numeorus. others similarly situated in Arkansas their constitutionally guaranteed right to study, to evaluate, to learn, to probe, and to inquire. They are, instead, relegated to total darkness in the area of understanding which, if they were permitted access to the theory, might strengthen the very belief the proponents of the statute seek to foster.

Man has sought to learn the truth, in order to devise a Utopian system of living together in society, ever since the first syllable of recorded history. This quest has not been an easy one in the face of political majorities who have devised hemlock, stake-burning, hanging, and all forms of physical and mental torture, to maintain the status quo of their unenlightenment and then accepted beliefs.

It is the contention of appellants that the intent and meaning of the First and Fourteenth Amendments to the Constitution of the United States, as originally adopted, and as considered in the light of the meaning and purpose of 20th Century living in the United States, require the free exchange of all scientific theory, no matter whether the inquiry directs itself to government, sociology, biology, religion or space travel. The Arkansas statute here considered, if permitted to stand in the face of these constitutional guaranties, makes all of them meaningless, and permits state government to retrogress to proscription of all learning, probing, evaluating and search for greater truths, no matter what the subject or the purpose of the scholar's inquiry. Therefore, the statute must be voided to preserve these freedoms of appellants, and of all others.

Traditional concepts of teaching have been made in harmonious if not divorced, by the holding of the Arkansas Supreme Court. Is there a difference between "explaining" a theory in a classroom and "teaching" a theory? It is the position of the appellants that there is no way to determine when a teacher in a classroom stops "teaching" and starts "explaining", or vica versa. Classroom discussion and explanation by the teacher is one of the essential elements of teaching. This the Arkansas statute prohibits and such attempted state prohibitions are specifically denied to the several states by the Constitution of the United States.

CONCLUSION

It is submitted that the decision of the Supreme Court of Arkansas erroneously upheld the constitutionality of the statutes involved; that the questions presented are so substantial as to require plenary consideration for their resolution, and upon consideration thereon the Court should reverse the judgment below.

Respectfully submitted,

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November, 1967

APPENDIX

APPENDIX

OPINION OF THE SUPREME COURT OF ARKANSAS

Present: All the Justices

Opinion Per curiam

* * * * *

Supreme Court of Arkansas

No. 5-4127

Opinion Delivered June 5, 1967

Appeal from Pulaski Chancery Court, First Division

Reversed and dismissed

* * * * *

State of Arkansas

—v—

Susan Epperson and H. H. Blanchard

* * * * *

Upon the principal issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928, Ark. Stat. Ann. Sec. 80-1627 and 80-1628 (Repl. 1960), is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.

The decree is reversed and the cause dismissed.

Ward, J., concurs. Brown, J., dissents.

June 5, 1967

FINAL ORDER OF THE SUPREME COURT OF ARKANSAS

Proceedings of a Special Session on Wednesday, July 26, 1967. Court convened pursuant to the call of the Chief Justice.

Present: Carleton Harris, Chief Justice; George Rose Smith; J. Fred Jones; Paul Ward; John A. Fogleman; Conley Byrd.

Absent: Lyle Brown

Court met this day and made the following orders:

Rehearing Petitions Denied. Petitions for rehearing were denied in the following causes:

. . . . .

#4127 State of Arkansas v. Susan Epperson, et al.

. . . . .

July 26, 1967

OPINION OF THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS, FIRST DIVISION, No. 131575

Susan Epperson, Plaintiff

—v.—

W. C. McDonald, Russell Matson, Warren Bass, James M. Coates, Dr. John A. Harrell and Mrs. Frank Gordon, as Directors of Little Rock School District, and Floyd Parsons, as Superintendent of Schools, Defendants
Hubert H. Blanchard, Jr., Intervenor

MEMORANDUM OPINION

This is an action instituted by the plaintiff, as a citizen and resident of Little Rock, Pulaski County, Arkansas, and as a teacher at Little Rock Central High School, employed by the Directors of the Little Rock School District, seeking a declaratory judgment and injunctive relief. Intervenor, Hubert H. Blanchard, Jr., intervened in the action, seeking a declaratory judgment under the terms of the Arkansas Declaratory Judgment Act (Ark. Stats. 34-2501 through 34-2512).

Both the plaintiff and the intervenor allege that Initiated Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) is unconstitutional and void because the act contravenes certain provisions of the Constitution of the United States and the Constitution of the State of Arkansas.

Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) reads as follows:

> "80-1627. DOCTRINE OF ASCENT OR DESCENT OF MAN FROM LOWER ORDER OF ANIMALS PROHIBITED. — It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the

doctrine or theory that mankind descended or ascended from a lower order or animals."

"80-1628. TEACHING DOCTRINE OR ADOPTING TEXTBOOK MENTIONING DOCTRINE — PENALTIES — POSITIONS TO BE VACATED. — Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act (Secs. 80-1627, 80-1628) by teaching the theory or doctrine mentioned in Section 1 (Sec. 80-1627) hereof, or by using, or adopting any such textbooks in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars ($500.00); and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member."

Section 4 of Article 14 of the Constitution of the State of Arkansas reads as follows:

"Section 4. SUPERVISION OF SCHOOLS. — The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly."

The First Amendment to the Constitution of the United States reads as follows:

"(RELIGIOUS AND POLITICAL FREEDOM.) — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> "Sec. 1. (CITIZENSHIP — DUE PROCESS OF LAW — EQUAL PROTECTION.) — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Let it be understood at the outset that this Court is not unmindful of the public interest in this case, or of the vital concern of many people in what theories may be taught in the schools, colleges and universities of this state.

The engrossing questions relating to the origin of man, the destiny of man, and the creation of the universe have engaged the thoughts and demanded the attention of the world's greatest philosophers, scientists, theologians, and educators. These questions cannot be answered by the enactment of laws or by the decisions of courts.

In view of the fact that many people have apparently misinterpreted the decisions of the United States Supreme Court regarding the teaching of the Bible in the public schools of our Nation, an explanatory statement seems appropriate. Statements are frequently heard such as "the Bible has been banned from the schools" and "the Bible cannot be taught in the schools". Such statements are not consistent with the language of the decisions of the Supreme Court. In the recent case of *Abington School Dis-*

trict v. Schempp, 374 U. S. 203, 10 L. ed. 2nd 844, Mr. Justice Clark, speaking for the Court, made the following statement:

> "In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such a study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment."

Judge Clark's opinion speaks for the majority and its language refutes any contention that the Bible or religion may not be taught in the schools nor studied in the schools.

In a concurring opinion in the same case Judge Brennan said:

> "The holding of the Court today plainly does not foreclose the teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion. To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not."

This Court does not interpret the decisions of the United States Supreme Court as prohibiting the teaching

of the Bible in the public schools. It is not the teaching of the Bible account of the creation of man contained in the Book of Genesis that is prohibited in the public schools, but it is the conduct of "a religious observation", or, "a religious exercise" which the Supreme Court has said the Constitution prohibits. The Supreme Court has ruled that school boards and officials cannot prescribe and require an official prayer, but this is far from ruling the Bible out of the public schools, statements to the contrary notwithstanding.

Religious practices may be tested or challenged in courts, but religious beliefs or experiences are beyond the competency of courts to prove or disprove. The truth or the fallacy of a scientific theory or doctrine (like a religious doctrine or belief) is not a triable issue in court.

The issue presented for determination in this case is whether or not the statute conflicts with the constitutional provisions securing the rights of freedom of speech, of thought, and expression, and securing the right to teach and the freedom to learn. Whether "the theory or doctrine that mankind ascended or descended from a lower order of animals" is true or false is not the issue presented, and, as above pointed out, is not a triable issue. The truth or the fallacy of arguments on each side of the evolution debate does not either contribute to or diminish the constitutional right of teachers and scientists to advance theories and to discuss them.

Any statute which seeks to limit or restrict the field of inquiry should be carefully and closely examined by the courts. "Teachers and students must always remain free to inquire, to study and to evaluate." *Shelton v. Tucker,* 364 U. S. 479, 5 L. ed. 2nd 231.

The field of science necessarily involves the discussion and evaluation of *speculative theories*. This has been recognized by the Supreme Court of the United States in the following language:

> "For society's good — if understanding be an essential need of society — inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and people's well-being, except for reasons that are exigent and obviously compelling." *Sweezy v. New Hampshire,* 354 U. S. 234, 1 L. ed. 2nd 1311.

In view of the testimony of the plaintiff that she does not propose, intend, or desire to teach as a proved and established fact the theory that mankind ascended or descended from a lower order of animals, set out in the textbook adopted by the Little Rock School Administration, this Court can find no "exigent and obviously compelling" reason to prohibit a teacher from presenting and explaining the theory along with other theories or doctrines which a student may accept or reject, even though the theory may be objectionable to many of our citizens. By use of the word "teach" the court accepts the common definition "to make aware of by information or to impart the knowledge of". That this is the meaning of the word "teach" intended by the statute is obvious since the statute forbids any teacher, textbook commission or other authority to adopt "a textbook that *teaches* the doctrine or theory".

This Court has carefully considered the holding in the

Scopes case. *Scopes v. State of Tennessee,* 154 Tenn. 105, 289 S. W. 363. It seems that the decision in that case was based principally upon the theory that "In dealing with its own employees engaged upon its own work, the State is now hampered by the limitation . . . . of the Fourteenth Amendment to the Constitution of the United States". Counsel for plaintiff and intervenor contend that the Scopes case has been completely overruled while the Attorney General argues that the decision in that case has only been modified. Even if the decision has not been completely overruled by later decisions of the United States Supreme Court, it is the opinion of this Court that the holding in the Scopes case has been modified and made obsolete to such an extent that it does not apply to the case at bar and that it should not be followed. *Gitlow v. New York,* 268 U. S. 652, 69 L. ed. 1138; *Torcaso v. Watkins,* 367 U. S. 488, 6 L. ed. 2nd 982; *Beilan v. Board of Education,* 357 U. S. 399, 2 L. ed. 2nd 1414.

The Fourteenth Amendment to the United States Constitution encompasses the first ten amendments to the Constitution and the guarantees therein contained. A state may not extinguish the freedoms guaranteed by the Constitution arbitrarily or unreasonably even in the exercise of the police power. Whether a statute is wise or unwise is not for the courts to say, but whether it is reasonable or unreasonable is for the courts to determine. The decision of the United States Supreme Court in the case of *Bartels v. Iowa,* 262 U. S. 403, 67 L. ed. 1047, appears to be in point. In that case the state had enacted a statute forbidding the teaching of foreign languages in the public schools. This statute followed the first World War and it was presumed that the German language was not popular with a majority of the citizens of the state. Nevertheless, the United

States Supreme Court held that such an act was arbitrary and unreasonable.

This Court is of the opinion that Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) tends to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach, and that a chapter in a biology book, adopted by the school administrative authorities, stating that a specific theory has been advanced by an individual that man ascended or descended from a lower form of animal life, does not constitute such a hazard to the safety, health and morals of the community that the constitutional freedoms may justifiably be suppressed by the state. If it should be held that the teaching of such a theory does constitute such a hazard, then the statute in question obviously fails to protect the student in a private school from the hazard and thus denies the equal protection of the law.

Many people do not agree with the decision of the United States Supreme Court. Others will agree with them. But it is the duty and responsibility of trial courts to follow the decisions of the Supreme Court even when we may not agree with them, if we are going to maintain our constitutional principles. This Court is not unmindful of the general rule that statutes should not be held constitutional where constitutionality is subject to doubt. In the Court's opinion the unconstitutionality of the statute under consideration is not subject to doubt, irrespective of the motives of those who secured its passage.

Therefore, it is the opinion and ruling of this Court that a decree be entered declaring Initiated Act No. 1 of 1928 (Ark. Stats. 80-1627 and 80-1628) unconstitutional and void, and that the defendants have no authority to

proceed under the act or to enforce the provisions thereof.

No testimony was offered or showing made in this action that the defendants, as Directors and Superintendent of the Little Rock School District, have threatened or have indicated any intention to dismiss plaintiff from her teaching position, or to cancel her contract to teach in the public schools of Little Rock. Counsel for the Directors of the Little Rock School District and the Superintendent of Schools, who are defendants in this case, announced in open court that the School Board and the school officials would follow the decree of this Court. In view of that statement the Court deems it unnecessary to issue an injunction at this time in aid of the declaratory judgment. However, if an effort is made in the future to enforce the statute an injunction would be appropriate.

Counsel for plaintiff and intervenor will prepare a precedent for decree consistent with this opinion and submit the precedent to opposing counsel for approval as to form and then this Court for consideration and signature.

Murray O. Reed, Chancellor

Date: May 27, 1966

DECREE OF THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS, NO. 131575.

This cause is this day submitted to the Court for its consideration and decree. The plaintiff and intervenor were represented by their attorney, Eugene R. Warren, Esq., the defendants by their attorney, Herschel H. Friday, Jr., Esq., and the State of Arkansas by its attorneys, Hon-

orable Bruce Bennett, Attorney General and Honorable Fletcher Jackson, Assistant Attorney General. The cause was submitted to the Court upon the complaint of the plaintiff, the intervention of the intervenor, the answer of the defendant and the answer of the State of Arkansas, and upon testimony of witnesses for both the plaintiff and the intervenor and the State of Arkansas and documentary evidence, from all of which the Court finds:

1. Initiated Act No. 1 of 1928 (Ark. Stat. 80-1627 and 80-1628) is unconstitutional and void.

2. It is unnecessary that an injunction be issued at this time in aid of this declaratory judgment. The Court should, however, retain jurisdiction of the cause to issue an injunction if any effort is made in the future to enforce said unconstitutional and void statute.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED, AND DECREED that Initiated Act No. 1 of 1928 is hereby declared unconstitutional and void. The Court retains jurisdiction of this cause to issue such orders as may be necessary in aid of this declaratory judgment. The memorandum opinion heretofore issued by the Court is made a part of this decree. Each party, hereto, shall bear his respective cost herein expended.

MURRAY O. REED, Chancellor

Date: June 16, 1966